

Craig R. McClellan (71865)
Michelle D. Mitchell (221841)
Robert J. Chambers, II (244688)
THE McCLELLAN LAW FIRM
1144 State Street
San Diego, California 92101
(619) 231-0505

Attorneys for Plaintiffs

FILED

2008 JAN -4 PM 4: 23

CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY KMH DEPUTY

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KATHLEEN VESTEVICH,
Plaintiff,

vs.

UNITED STATES OF AMERICA; THE
CENTERS FOR MEDICARE AND MEDICAID
SERVICES; CNI ADMINISTRATION
SERVICES, LLC,
Defendants.

Case No.: '08 CV 0027 L JMA
COMPLAINT FOR DECLARATORY RELIEF

Plaintiff alleges as follows:

1. Plaintiff is a competent adult and resident of the State of California.

2. Defendant, the United States of America, is a sovereign nation.

3. Defendant, Centers for Medicare and Medicaid Services ("CMS"), formerly known as Health Care Financing Administration, is a division of the Department of Health and Human Services, the governmental agency that administers the Medicare program.

///

///

1 4. Defendant, CNI Administration Services, LLC, is a limited liability company
2 registered in the State of Oklahoma and doing business in California. It was awarded a
3 contract by CMS on October 2, 2006 as a national Medicare Secondary Payer Recovery
4 Contractor ("MSPRC") for all post-payment recoveries.

5 5. Jurisdiction over this action is conferred by Title XVIII of the Social Security Act
6 (The Medicare Program) and pursuant to the recovery provisions of the Medicare Secondary
7 Payer legislation, 42 U.S.C. §1395y(b)(2)(B)(ii), 42 C.F.R. §411.24(b) and/or the Federal
8 Claims Collection Act, 31 U.S.C. §3711, *et. seq.*

9 6. Venue is proper in this Court inasmuch as a substantial part of the events or
10 omissions giving rise to the claim occurred in this district, or a substantial part of the property
11 that is the subject of the action is located within this district.

12 7. On January 21, 2006, plaintiff's husband, James C. Vestevich, was critically
13 injured and later died after the motorcycle he was riding was struck by another vehicle.

14 8. Plaintiff settled with Lorenzo Villa, the driver of the vehicle that struck Dr.
15 Vestevich, for the Progressive Auto Insurance policy limits of \$15,000 for the damages she
16 suffered as a result of her husband's death.

17 9. In addition, plaintiff had to pursue an underinsured motorist claim against USAA
18 Insurance, Dr. Vestevich's automobile insurance company. Plaintiff settled with USAA
19 Insurance for \$285,000.

20 10. Following the settlements with Progressive Auto Insurance and with USAA
21 Insurance, plaintiff attempted numerous times to determine whether defendants would be
22 asserting a lien and/or claiming a right of recovery on the wrongful death settlement and, if so,
23 that defendants waive any purported lien rights pursuant to *Fitch v. Select Products Co.* 36
24 Cal.4th 812, 819 (2005), and *California Code of Civil Procedure* sections 377.34 and 377.61.

25 ///

26 ///

11. Defendants ultimately asserted a lien in the amount of \$83,109.42. However, defendants have wholly failed and refused to respond to plaintiff's request that they waive their lien rights - despite plaintiff's repeated requests over the past ten months to do so. Defendants' failure to respond is precluding the distribution of the settlement proceeds to plaintiff.

12. A declaratory judgment is necessary to determine whether defendants are asserting a claim for recovery of any benefits paid, and if so, to expunge any purported lien of defendants on the basis of law and equity.

WHEREFORE, plaintiff prays for declaratory judgment against defendants as follows:

1. That the Court declare the respective rights and duties of plaintiff and defendants;
2. That the Court declare, as a matter of law, defendants have no lien rights on the wrongful death recovery obtained by plaintiff;
3. That plaintiff be awarded her costs, expenses and attorneys fees incurred herein; and,
4. For such other and further relief as the Court deems just and proper.

Dated: January 4, 2008

THE McCLELLAN LAW FIRM

By: 

ROBERT J. CHAMBERS, II
Attorneys for Plaintiff

JS 44 (Rev. 11/04)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

KATHLEEN VESTEVICH

(b) County of Residence of First Listed Plaintiff SAN DIEGO
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Craig R. McClellan, Michelle D. Mitchell, Robert J. Chambers II:
The McClellan Law Firm, 1144 State St., SD CA 92101 (619) 231-0505

DEFENDANTS

United States of America, the Centers for Medicare and Medicaid Services; CNI Administration Services, LLC

County of Residence of First Listed Defendant SAN DIEGO
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE
LAND INVOLVED. DEPUTY

Attorneys (If Known)

2008 JAN 4 PM 4:27
CLERK US DISTRICT COURT
SAN DIEGO
'08 CV 0027 L JMA

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input checked="" type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	
		LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	
			FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation
- ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing. (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. Section 1395y(b)(2)(B)(ii), 42 C.F.R. Section 411.24(b); 31 U.S.C. Section 3711

Brief description of cause:
Declaratory Relief

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND:

☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

01/04/2008

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # 146146

AMOUNT \$350

APPLYING IFP

JUDGE

MAG. JUDGE

**UNITED STATES
DISTRICT COURT**
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

146146 - BH

**January 04, 2008
16:30:24**

Civ Fil Non-Pris

USAO #: 08CV0027 CIVIL FILING

Judge.: M. JAMES LORENZ

Amount.: \$350.00 CK

Check#: BC# 18762

Total-> \$350.00

FROM: VESTEVICH V. USA ET AL
CIVIL FILING